

September 10, 2013

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Re: Your Request for Informal Assistance
Our File No. I-13-100

Dear Ms. Valdez:

This letter responds to your request for advice regarding financial reporting and the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Because you seek general guidance, we are treating your request as one for informal assistance.²

QUESTION

Many local agencies are contracting out a portion of their human resources administration to private firms. What standards apply to determine whether individuals providing such administrative services are “consultants” under the Act, subject to its conflict of interest and economic disclosure provisions?

CONCLUSION

Under the Act, an individual consulting to a government agency is required to file a statement of economic interests and is covered by the conflict-of-interest rules if the consultant makes governmental decisions as defined in Regulation 18701(a)(2) or serves a staff capacity

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c)(3).)

and participates in governmental decisions or performs the duties of an individual in the agency's conflict-of-interest code. (Regulation 18701(a)(2) and 18702.2.)

Based on the sample facts you provided, individuals in the human resources firm Paychex providing HR services to the local agency will not be considered consultants where the services they are providing consist of payroll, administrative and educational services, administering health benefits insurance, and implementing hiring, overtime and other decisions made by employees of the government agency. In these instances, the individuals in the human resources firm will not be making a governmental decision, or serving in a staff capacity and participating in a governmental decision or performing substantially all the same duties as someone in the agency's code, which would require their designation as a consultant.

FACTS

In your work as a Senior Paralegal, you review conflict of interest codes on behalf of local agencies, many of which contract out some portion of their human resources administration. You are requesting general guidance about whether individuals in the private firms providing human resources services to certain local agencies should be considered consultants under the Act subject to its conflict of interest provisions and required to file annual statements of economic interests.

For example, you have a client that has outsourced the bulk of its human resources duties to the firm Paychex. You have sent us a copy of the services agreement between the Lake Arrowhead Community Services District (the "district") and Paychex, and the overview and the objectives of this agreement. You also provided summaries from each of these documents as to what prompted you to believe certain individuals working under this contract may be considered consultants and required to file Form 700s narrowed to interests based on their duties.

You spoke with a company representative and attorneys working on this matter and from what they tell you, the individuals that have ongoing contact with the district only provide payroll, administrative and educational services. They state that no one person has any responsibility for representing the district in dealing with any claims, insurance, negotiations, etc. There are a couple of employees at Paychex who administer this client, but they only deal with the human resources duties and health benefits insurance, which appear to be just a process based upon the information you obtained. Paychex also develops and provides all policy documents and handbooks but retains ownership. These are developed based on Paychex's review of applicable federal and state statutes and regulations then in effect.

ANALYSIS

The Act's conflict-of-interest rules prohibit a public official from making, participating in making, or using his or her official position in any way to influence a governmental decision in which the official knows, or has reason to know, that he or she has a "financial interest." (Section 87100.) Section 87103 provides that a public official has a "financial interest" in a

governmental decision “if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any” of the official’s economic interests. In addition, certain state and local public officials must file periodic statements of economic interests (Form 700) disclosing those personal assets and interests that may be affected during the performance of their official duties. (Sections 87200 - 87350.)

A. Consultant.

The Act defines “public official” to include “every member, officer, employee or *consultant* of a state or local government agency.” (Section 82048, emphasis added.) In addition, the Act defines the term “designated employee” to include “any officer, employee, member, or *consultant*” of any agency who meets specified criteria. (Section 82019, emphasis added.) Under the Act, each agency is required to adopt a conflict-of-interest code. (Section 87300.) Typically an agency’s conflict-of-interest code includes designations for consultants to the agency.

The term “consultant” is defined in Regulation 18701(a)(2) as an individual who, pursuant to a contract with a state or local government agency:

“(A) Makes a government decision whether to:

“(i) Approve a rate, rule, or regulation;

“(iii) Issue, deny, suspend, or revoke any permit license, application, certificate, approval, order, or similar authorization or entitlement;

“(iv) Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;

“(v) Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;

“(vi) Grant agency approval to a plan, design, report, study, or similar item;

“(vii) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or

“(B) Serves in a staff capacity with the agency and in that capacity participates in making a government decision as defined in regulation 18702.2 or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a

position specified in the agency's Conflict of Interest Code under Government Code section 87302."

Thus, there are two ways that an individual can become a "consultant."³ First, an individual may be a "consultant" if he or she, pursuant to a contract with a government agency, makes government decisions or enters into contracts for the agency as described in Regulation 18701(a)(2)(A). Alternatively, an individual may be a "consultant" if he or she serves in a staff capacity and either participates in governmental decisions (as defined) or performs the same or substantially all the same duties that would otherwise be performed by an individual in a position listed in the agency's conflict-of-interest code.

1. Makes government decisions.

As described in Regulation 18701(a)(2)(A) above, if an individual is performing services under a contract with a government agency and "makes a government decision" for the agency as listed in that provision, he or she is a consultant.

We note that you are taking the right approach in looking at the actual duties an individual at the human resources firm performs on behalf of the government agency. The sample contract you submitted between Paychex and the district seems to be a general, form contract that lists all possible human resources services that Paychex may provide for the district or for other clients. In determining whether an individual needs to be designated as a consultant, you are correct to focus on the *actual duties performed* by an individual in the human resources firm for a government agency, rather than the possible services listed in a form contract.

For example, Paychex advised you that the individuals who will have ongoing contact with the district will only provide payroll, administrative and educational services. They stated that no one person has any responsibility for representing the district in dealing with any claims, insurance, negotiations, etc. There are a couple of employees at Paychex who administer the district as a client but this is only dealing with the human resources duties and health benefits insurance processing.

The facts in your example indicate that the individuals at Paychex will not be making government decisions, entering into contracts or performing other actions listed in Regulation 18701(a)(2)(A) for the district. Accordingly, we next examine whether the individuals serve in a staff capacity under subdivision (B).

³ A business entity cannot be a "consultant" under Regulation 18701(a)(2), because the term is applied only to an "individual," that is, a natural person. It is the employee of the firm, who actually performs the duties under the contract, who may be a consultant if his or her activities meet the definition of "consultant." (*Herscher* Advice Letter, No. A-92-278.)

2. Serves in a staff capacity.

The phrase “serves in a staff capacity” in subdivision (B) has been construed by the Commission to include only those individuals who are performing substantially all the same tasks that normally would be performed by one or more staff members of a governmental agency. Implicit in the notion of service in a staff capacity is an ongoing relationship between the contractor and the public agency. We have advised that a contractor serves in a staff capacity where the contract calls for work to be performed “over more than one year” on “high level” projects (*Ferber* Advice Letter, No. A-98-118).

We have advised that a contractor does not act in a staff capacity where the work is to be performed on one project or a limited number of projects over a limited period of time (*Sanchez* Advice Letter, No. A-97-438), where the relationship between the contractor and the agency would last only 12 – 16 months with no ongoing relationship contemplated (*Harris* Advice Letter, No. A-02-239) and where, under a multi-year contract, the contractor would perform only on a sporadic basis. (*Maze* Advice Letter, No. I-95-296; *Parry* Advice Letter, No. I-95-064.)

The services you are inquiring about will be performed by the human resources firm for the local government agency on a continuing, ongoing basis. The agreement between Paychex and the district for human resources services will continue until terminated and involves a variety of duties that would otherwise be performed by district employees. Under these circumstances, the individuals at the human resources firm will be working in a staff capacity.

The next step in the analysis is to determine whether the consultant will either participate in making a governmental decision or will perform “the same or substantially all the same duties . . . that would otherwise be performed by an individual holding a position specified in the agency’s Conflict of Interest Code . . .”

Participates in making a governmental decision or performs the same or similar job duties normally performed by an individual in a position listed in the agency’s conflict-of-interest code.

Regulation 18702.2 states that an official participates in making a governmental decision when, acting within the scope of the official’s position, the official:

“(a) Negotiates, without significant substantive review, with a government entity or private person regarding a governmental decision referenced in [Regulation 18701(a)(2)(A)];

“(b) Advises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by:

“(1) Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is

to influence a governmental decision referenced in [Regulation 18701(a)(2)(A)]; or

“(2) Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in [Regulation 18701(a)(2)(A)].”

Under the contract between Paychex and the district, it appears that the individuals providing human resources services to the agency will be implementing decisions already made by the government agency, rather than be participating in governmental decisions or performing duties of an individual in a position listed in the agency’s conflict of interest code, and thus would not be considered consultants under the Act. This is true where the individuals are providing administrative services, handling payroll, providing educational services, and processing health benefits insurance. This is also true where the individuals at the private human resources firm are implementing decisions made by employees of the local agency with respect to new hires, separations and overtime authorization.

However, if individuals in the private human resources firm are making executive decisions concerning human resources matters on behalf of the agency, such as making hiring decisions, deciding what health benefits to offer (that have not already been pre-approved), or approving contracts on behalf of the agency, then you are correct that they would need to be designated as consultants under the Act.

For example, outside human resources personnel will not require being designated as a consultant in an agency’s conflict-of-interest code if they undertake the following activities:

- payroll administration;
- administration of employee benefits;
- processing new agency hires or separation of employees;
- implementing authorized employee overtime;
- prepare salary or benefits surveys for consideration by the government agency.

On the other hand, outside human resources personnel will need to be designated as a consultant in an agency’s conflict-of-interest code if they undertake the following activities:

- hire an outside attorney to represent the agency in personnel issues;
- select and purchase software for the agency for use payroll and human resources administration;
- select benefits packages offered to agency employees, including determining what kind of benefits to provide or which providers to utilize;
- participate as part of the agency’s executive management team;
- approve health benefit claims.

In addition to someone who “serves in a staff capacity” and “participates in making a government decision,” the regulation also includes as a consultant an individual who “serves in a staff capacity” and “performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding in a position specified in the agency’s conflict-of-interest code.” Of course, an agency’s conflict of interest code specifically lists positions that make or participate in government decisions.⁴ You will want to review a local government agency’s conflict of interest code carefully, to make sure that the code is not overbroad in designating agency employees who have human resources responsibilities that do not involve making or participating in a governmental decision. This will ensure that individuals at an outside HR firm will not be inadvertently pulled in as consultants under this provision.

We hope this provides you general guidance as you review the contracts for human resources services entered into by local agencies. If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Hyla P. Wagner
Senior Counsel, Legal Division

HPW:jgl

⁴ The definition of “designated employee” under Section 82019 includes those whose position entails making or participating in making government decisions, exempt employees, elected positions, and those employees involved in contracting or procurement.